

Indiana Board of Special Education Appeals



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BEFORE THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of C.M.E. and the)
Duneland School Corporation and) **Article 7 Hearing No. 945-97**
Porter County Education Interlocal)

The Student, through her Parents, raised a number of issues before the Independent Hearing Officer (IHO). These issues were mainly concerned with appropriate identification, appropriate educational and related services (particularly concerning physical therapy (PT), occupational therapy (OT) and speech and language therapy), least restrictive environment (LRE), and the need for extended school day and extended school year.

PROCEDURAL HISTORY OF THE DUE PROCESS HEARING

It should be noted from the outset that any reference to the "Student" includes the Parents of the Student. Reference to the school refers to both the LEA and the special education interlocal.

- February 12, 1997* The Parents requested a hearing for the Student, claiming that the recommended placement was too restrictive, recommended services were not provided or were inadequate, lack of transportation when the Student's home school was not in session due to inclement weather but the Student's school of attendance was in session, and the need for an extended school year.
- February 17, 1997* Jerry L. Colglazier, Esq., was appointed IHO under 511 IAC 7-15-5.
- February 24, 1997* Prehearing conference was held.
- February 25, 1997* School requested an extension of time for the hearing.
- March 5, 1997* The IHO granted the extension of time, and sent notice of the hearing, scheduled for April 3, 4, 7, 8 & 11, 1997 (as needed), with the decision to be rendered by May 6, 1997.

March 6, 1997

A Prehearing Order was issued addressing the February 24, 1997 prehearing conference, acknowledging the parties were advised of their rights, identifying the issues, confirming the dates of the hearing and advising the parties of hearing procedures.

March 28, 1997

The parties stipulated to the following issues for hearing¹:

Hearable Issues

1. What is the appropriate level of related services required to support Student's educational progress in the areas of speech language therapy, occupational therapy, and physical therapy?
2. What are the proper methodologies that should be utilized during therapy services?
3. What is the proper method of instruction for utilizing Student's classroom aide?
4. Is an extended school day necessary in order for Student to receive educational benefit commensurate to her grade level peers?
5. Is an extended school year necessary to support Student's educational goals?
6. What are the appropriate supplemental aids and services necessary to support Student in the LRE? (i.e., shorten assignments and tests and time spent in pull-out services).
7. Was the proper weight given to providing Student with opportunities for integration with non-disabled peers and for instruction toward independent self-help skills in the placement proposed by the LEA under LRE analysis?
8. Does the LRE placement provide Student with the educational benefit of grade level curriculum appropriate for Student's needs?
9. Did the LEA's recent educational evaluation appropriately identify Student's disability?
10. Whether Student's mobility within the school environment is being appropriately addressed?

Complainable Issues for Hearing

11. Whether the LEA's closing due to inclement weather resulted in a violation of Article 7 due to the loss of a school day?
12. Whether the case conference committee properly considered parental concerns raised during the case conference meeting?

Tentative Additional Issues

13. Physical examination of Student without permission from Parents?
14. Adaptations required to Student's Rifton chair, i.e., bottom cushion, dicem, back cushion, and foot straps/sandals.

¹The parties stipulated at the beginning of the hearing that issue number 13 was resolved. Issue number 14 was merged with hearable issue number 6, leaving a total of twelve issues for the hearing.

The due process hearing was conducted over five days--April 3, 4, 7, 8 and 11, 1997. A final prehearing conference was held immediately prior to the start of the hearing. At the start of the hearing, the parties' exhibits were admitted. The school objected to Parents' Exhibits P-5 and P-6 as not specific to the Student and not relevant to the issues. The objections were noted on the record, and Parents' Exhibits P-1 through P-12 were admitted. Joint Exhibits and the school's Exhibits Section A through Section L were admitted without objection (with the Joint Exhibits being identified in bold lettering in the table of contents). During the course of the hearing, additional exhibits identified as IHO Exhibits 1 through 7 were admitted without objection. At the conclusion of the hearing, the parties agreed to file post hearing briefs in lieu of final argument, and further agreed to additional time to file closing briefs and review the transcript such that the decision was to be issued by May 20, 1997.

The IHO's written decision was issued on May 20, 1997. The IHO found the Student to be 10 years old and diagnosed with moderate spastic quadriplegia cerebral palsy. The Student was initially enrolled in the school in August, 1996 at the Special Education Learning Facility (SELF School). Since November, 1996, the Student has been enrolled in the third grade at Parkview Elementary School within the Valparaiso Community Schools district. The Parents originally resided within the Valparaiso Community Schools district but at the time of the hearing resided within the Duneland School Corporation. Brummitt Elementary School is within the Duneland school district. Prior to moving to the Valparaiso area, the Student attended school in the Williamsville Central School District in Buffalo, N.Y. During the 1991-92 school year, the Student received a preschool program of home instruction and OT, PT and speech therapy, with each therapy service provided in 60 minute sessions five times per week. The related services continued during kindergarten for the 1992-93 school year, although due to extensive surgeries, the Student received mostly homebound instruction.

Following a due process hearing decision in May, 1993, the Student was placed at the Language Development Program (LDP) for a short time before being enrolled in School 84 for the 1993-94, 1994-95 and 1995-96 school years. The same level of related services continued, and the Student received an extended instructional day to provide additional services. School 84 is specifically designed for students with physical disabilities. Re-evaluations were completed in May and June, 1996 and recommendations made for the 1996-97 school year. These recommendations included the same levels of OT, PT and speech therapy in addition to home instruction of 7.5 hours per week, home speech, 2x per week, 30 minute sessions, a classroom aide 30 hours per week with the aide to attend therapy sessions for carryover to the classroom. In addition to the therapies provided by the school, the Student received private services at the Parents' expense.

The Parents advised the school in July, 1996 of their pending move into the district and provided the proposed 1996-96 IEP and 46 pages of reports and evaluations of the Student. The Student was placed at SELF School pursuant to an interim IEP (duration from 9-4-96 to 10-7-96) which was developed as a diagnostic placement. As a result of the diagnostic placement, the school determined the Student was functionally at a higher level than the New York IEP suggested and recommended a formal educational evaluation. The September case conference committee agreed to a change of placement to Parkview Elementary, third grade with 30-40 minutes of OT per week, 30-40 minutes of PT per week, 80 minutes of speech/language therapy

per week and supported and/or supplemental instruction for math in the general education setting by a resource teacher. The formal evaluations by the school resulted in similar testing results as determined by the New York testing, however, the interpretation of the data differed. Severe discrepancies were noted between achievement and ability in expressive language, mathematical reasoning, mathematical calculation and listening comprehension. Because of parental concerns of future implications of the language of mildly mentally handicapped range, the school psychologist report was amended to include the specific statement: "These results do not imply that [Student] is mentally handicapped but rather reflect the impact of [Student's] physical limitations upon her adaptive behavior functioning." The school determined the Student was no longer eligible for a classification of multiple handicap (as in New York) because the disabilities were not interacting and resulting in learning needs so complex that a single disability could not be identified as primary, but should be classified with the primary disability of Orthopedic Impairment, with secondary disabilities of Communication Disorder and as Learning Disabled in mathematical reasoning, mathematical calculation, expressive language, and listening comprehension.

The case conference committee developed an IEP that was not agreed to by the Parents for the period of 12-9-96 to 6-5-97. The Student does not use a wheelchair at home and the Parents do not want a wheelchair used in the school environment. The school determined that extended school year was not appropriate. It was agreed that placement would continue at Parkview Elementary even though the LEA believed the Student's home school of Brummitt Elementary would be appropriate and the school recommends Brummitt for the 1997-98 school year. The LRE recommended was general education for most of the instructional day with special education instruction or related services provided in a resource room for part of the school day. Related services included PT one time per week for 30-45 minutes with a daily exercise program of 20-30 minutes; OT one time per week for 30-45 minutes with individual fine motor/handwriting training and practice 20 minutes per day; a lap top computer for full access at school and at home; an evacuation plan; and a trained paraprofessional to assist in all areas. Recommended adaptations included supported instruction by the Learning Disabled (LD) teacher in math, listening comprehension and expressive language for 90 minutes per day; speech and language services for 60 minutes per week direct, 20 minutes per week supported; and consultation as needed with regular and special education teachers.

Range of motion studies of PT and OT from the school, New York, Children's Hospital of Chicago and Indiana Medial Laboratories were reported and discussed during the hearing. There is a discrepancy in the findings due, in part, to normal variance in findings by different individuals and the methods of testing. There has been a decrease in ranges of motions from the beginning of the 1996-97 school year to the time of the hearing, and medical interventions and private therapies at Parents' expense have been instituted.

The Student first walked at age six, and used a wheel chair for mobility in the educational setting until the beginning of school year 1996-97 when she began using a reverse walker exclusively in the school setting. The Parents and their experts expressed belief in the possibility of continued gains for the Student in self help, independent living, and at least walking with a cane. The School's PT and OT describe their mission as making Student more independent in mobility, transfers, self-help, self-sufficiency, etc., in the educational environment. They

reported gains in transfers in toileting, from desk to walker and return, improvements in endurance, distances traveled, travel time reductions, and walking further and faster.

The parties both rely upon “Indiana’s Guidelines For The Provision of Occupational and Physical Therapy Services in Special Education,” (hereinafter the “Guidelines”) to support their positions relative to the appropriateness and extent of therapy services and for the determination as to what is educational versus medical need. The School proposed an integrated therapy model according to the “Guidelines.” The LEA believes the Student is capable of gradual improvement, but does not expect either significant increases or decreases in skill level. The LEA has determined the Student does not need PT/OT in connection with breath control for speech production.

Little or no testimony was presented concerning whether the school closing due to inclement weather on one day was a violation of Article 7. Considering the entire record, including days of school missed for therapy or other reason, there is no evidence that the one day school closing resulted in a violation of Article 7.

Based upon the above-referenced Findings of Fact, the IHO concluded that the home school for the Student is Brummitt Elementary in the Duneland School Corporation and that placement of the Student at Brummitt is an appropriate placement. The appropriate classification of the Student is a primary disability of Orthopedic Impairment with secondary disabilities of Communication Disorder and Learning Disabled in mathematical reasoning, mathematical calculation, expressive language and listening comprehension. The Student has made academic gains and reasonable academic progress during the school year. Although there are deficits in math, improvement is present and the proposed modifications for instruction are appropriate. There is insufficient evidence to establish that the Student would regress academically over the summer without extended school year for academics. The Student has made reasonable academic progress such that extended school day and extended school year are not required to prevent academic regression.

The case conference committee properly included parental participation, and although the school did not adopt all or many proposals of the Parents, the case conference was conducted in conformity to Article 7.

There has been a decrease in range(s) of motions from the beginning of the 1996-97 school year to the time of the hearing, contractures have developed or were present at the time of hearing, and medical interventions and private therapies at Parents’ expense have been instituted. The school has not demonstrated that decreases in ranges of motion and the development of contractures should be construed merely as medical needs rather than educational needs. Casting and surgeries that may be required are medical needs that the school does not provide.

The direct and consultative OT and PT provided by the School have not been at an appropriate level of service. The level of services provided in New York are excessive when considering the Indiana “Guidelines.” The recommendations of Children’s Hospital to increase PT to three times per week to include aggressive stretching of gastrocnemius and knee areas are educationally appropriate and are proper within the Indiana “Guidelines.”

The Student has made considerable gains in mobility, transfers, and self-help skills in the past three years. The Student has the ability to improve walking skills, at a minimum to a cane, to improve self-help skills to permit independent living, and to improve OT skills, such as penmanship which justifies the greater need for therapy.

Respiratory function and breath control are important to the speech of a cerebral palsy student and should be incorporated into therapies by the School. Adaptations to the Student's chairs should include cushions and dicem for the Student to sit on. The need for a cushion is for comfort in sitting rather than stability.

The Student's age suggests she will experience moderate to significant physical growth over the next several years, both progressive and in spurts. Regression and contractures are a real possibility without continuous therapy, and elimination of PT and OT during the summer for a cerebral palsy child with Student's involvement is not appropriate.

Although the issues did not include a determination of pendent placement pending hearing or appeal, the IHO recommended the parties consider placement at Brummitt and the services ordered in the IHO's decision if an appeal is undertaken.

Based upon the foregoing findings of fact and conclusions of law, the IHO issued the following orders:

1. The Student shall be placed in the fourth grade at Brummitt Elementary School, Duneland School Corporation, and shall receive general education for most of the instructional day with special education instruction and related services provided in a resource room for part of the school day provided by the Porter County Education Interlocal at the beginning of the 1997-98 school year.

2. The Student is eligible for special education services with a primary handicap of Orthopedic Impairment, and secondary handicaps of Communication Disorder, and Learning Disability in the areas of mathematical reasoning, mathematical calculation, expressive language, and listening comprehension

3. Student shall receive supported instruction by a Learning Disabled (LD) Teacher in math, listening comprehension, and expressive language at a minimum of 90 minutes per day.

4. A paraprofessional will be provided to the Student for the entire instructional day for classroom activities and for mobility within the school environment. The paraprofessional shall assist Student in notetaking particularly when Student is not in the classroom. The paraprofessional shall review notes with Student daily, including after school hours if required. The paraprofessional will be trained to instill self-starting skills to Student. Although the Student may receive modified assignments in math as determined by the regular and LD Teachers, the Student will be provided the entire math assignments to be completed individually as homework. The homework may or may not be graded at the option of the teacher.

5. The LEA shall not use a wheelchair with Student except in evacuation plans unless the Parent gives written permission (such as on field trips).

6. The LEA shall provide occupational therapy and physical therapy, directly or by contract with private Occupational and Physical Therapists, during the summer months of one hour sessions one time per week for each.

7. The LEA shall provide combined direct physical therapy and occupational therapy during the school year of 90 minutes per day three days per week. The Physical Therapist and Occupational Therapist shall collaborate upon the division of time and provision of these services. The therapy shall include aggressive stretching and extending muscles, tendons, and joints, and shall address, as a minimum, trunk strengthening (abdominal and extensors), pelvic strengthening for stability, postural alignment to address forward trunk lean and asymmetry, the need for full knee extension, and the need to improve ankle dorsiflexion range of motion. PT and OT therapies shall be on a pull out basis from the general education classroom.

A daily exercise program shall be developed for the remaining two days per week. The "Guidelines" specifically state that to be designated "therapy," the treatment program must be performed by an occupational therapist, physical therapist, occupational therapist assistant, or physical therapist assistant.

The direct physical and occupational therapies should begin prior to the normal school day whereby there is minimal interruption to academics.

8. The Student's chair(s) shall have a dicem to keep her from sliding, and a cushion to sit on.

9. The LEA shall provide direct speech/language therapy of 60 minutes per week. The speech/language therapy shall include, but not be limited to, breath control and function, strength and improved production of sound. Supported services of 20 minutes per week, and consultation as needed with regular and special education teachers shall also be provided.

10. The LEA shall convene a case conference to develop an IEP incorporating the items ordered herein with the goals and objectives, and special education services as developed in Exhibit B that are not in conflict with items ordered herein.

Extended school year is limited to services directed in order 6 immediately above.

The IHO advised the parties of their right to appeal and the timelines for doing so.

PROCEDURAL HISTORY OF THE APPEAL

The IHO's written decision was issued May 20, 1997. The School requested on June 18, 1997, an extension of time to prepare a Petition for Review. The Indiana Board of Special Education Appeals (BSEA) on June 19, 1997, entered an order granting the request, permitting the School to prepare and file a Petition for Review by the close of business on June 30, 1997 and extending until August 29, 1997, the date by which the record must be reviewed and final decision entered. The Parents timely filed their Petition for Review on June 23, 1997. The School's Petition for Review was received on June 30, 1997 and the School's Response to Parent's Petition for Review was received on July 2, 1997, at which time the School also filed corrections to its petition. On July 3, 1997, the Parents' attorney filed a Motion for Extension of Time to respond to the School's petition. By order dated July 3, 1997, the BSEA granted the request for an extension of time, permitting the Parent to prepare and file a Response to the Petition for Review by the close of business on August 6, 1997 and also extended until September 2, 1997, the time within which it must conduct review and issue a written decision. On August 1, 1997, the BSEA received a letter from the IHO to clarify the record. The Parent's Response to School's Petition was timely filed by certified mail dated August 6, 1997.

On August 5, 1997, the BSEA, through the legal sections' administrative assistant, contacted the attorneys of the parties to schedule a hearing in this matter, preferably on August 28, 1997. Both attorneys indicated they were available. In later telephone conversations, the School's attorney indicated potential difficulties due to that date being the first day of school, and the unavailability of school personnel and conference room in which to hold the hearing. The attorney was advised she could file for an extension of time and the BSEA would rule on her motion. On August 5, 1997, the School did, by facsimile transmission, request an extension of time for the hearing due to the unavailability of school personnel who will be involved in preparing inservices to staff, attending to scheduling difficulties and filling professional vacancies. The School also requested the BSEA reconsider any proposal to hold the hearing outside of the Porter County area. Having determined that the attorneys for both parties were available for hearing on August 28, 1997, the BSEA on August 5, 1997, denied the School's request for a continuance of that date. On August 6, 1997, the parties were notified of the scheduling of oral arguments in this matter on August 28, 1997, at 10:00 a.m. in the Porter County Education Interlocal conference room.

Parent's Petition for Review

The Parent's Petition for Review was timely filed on June 23, 1997. The Parents object to Orders Nos. 1, 4, 6, 7 and 9. As to Order No. 1, the Parents argue that Brummitt is not an appropriate placement as staff have less experience in dealing with children with severe physical impairments and the school is not equipped for such students. The Parents contend that mainstreaming is not appropriate and that the level of therapy ordered would require removal from regular education such that the IHO should have ordered 1½ hours per day of home tutoring for the Student to keep up with academics. In Order No. 4, the Parents believe the order should also require that the paraprofessional attend therapy with the Student so the paraprofessional can be trained by the therapist in positioning and movement. As to Order No. 6, the Parents argue that the therapies provided during the summer should be at the same level as the therapies provided during the school year as the Student's muscles do not distinguish between summer and the school year. The Parents disagree with the amount of therapy provided in Order No. 7, believing the Student needs 5 hours per week of direct PT and 6 hours per week of direct OT. The Parents would also prefer the Student be assigned to different therapists due to the limited expectations held by the Student's current therapists. The Parents also argue that the level of speech/language therapy provided in Order No. 9 is inadequate. The Parents claim the Student needs one hour per day of speech/language therapy at school and another hour per day of therapy provided after school.

School's Response to Parents' Petition for Review

The School points out that the basis for Order No. 1 is the LRE requirement found at 511 IAC 7-12-2(a). The School argues that the same level of services could be provided at Brummitt Elementary School as at Parkview Elementary School. The School contends that attending the Student's home school would provide greater opportunities to advance peer relationships and provide motivation in developing physical functioning skills. As to the Parents' objections to Order No. 4, the School points out that their proposed IEP (portions of which are adopted in the IHO's decision) would provide the paraprofessional with training to assist in her daily exercise

program. Because the School is also appealing portions of Orders No. 6, 7 and 9, the School refers the BSEA to its Petition for Review, pages 10-13, 21-30 and 8-10 for its position as to these orders. The School's arguments are addressed below as to these orders. Finally, the School argues that the Student has made marked progress and therapists should not be changed merely because they do not agree with the Parents' position.

School's Petition for Review

The School's Petition for Review was timely filed on June 30, 1997. The School took exception to a number of findings of fact, conclusions of law, and orders as being arbitrary or capricious, an abuse of discretion, contrary to law or a constitutional right, excessive abuse of discretion, a violation of Article 7 procedures, or unsupported by substantial evidence. The School has stated its objections to the findings, conclusions and orders in groups based upon particular issues in dispute.

The School's first objection is to Finding of Fact No. 5 which recites the Student's educational background in New York Schools.² The School argues this finding misstates the levels of services the Student received while in New York, and that this finding then leads to erroneous conclusions.

The School objects to Findings of Fact Nos. 4 and 10 as being unsupported by the evidence. Finding of Fact No. 4 indicates the Student has been enrolled at Parkview Elementary School since November, 1996. The School argues that the placement at Parkview took effect shortly after the parent's signature on September 27, 1996. The School argues that Finding of Fact No. 10 erroneously states the amount of OT and PT services recommended in the September, 1996 IEP. This finding cuts in half the amount of OT and PT the School claims was recommended in the IEP.

The School objects to Finding of Fact No. 14 and Order No. 5³ as being contrary to law. The portion of Finding of Fact No. 14 to which the School takes exception provides "The IHO notes that Section 504 and ADA issues are not present herein, however, the LEA's use of a wheel chair in extracurricular activities, i.e., field trips, may impact those regulations." The School disagrees with the IHO's resistance to ruling on the appropriateness of the use of a wheelchair as

²The School notes in a footnote that the IHO relied upon the School's Educational Summary, a statement made in error and which was later corrected in the School's Post Hearing Brief.

³The School indicated in its corrections to the petition for review that Order No. 6 should be added along with the objection to Finding of Fact 14. However, the order quoted is Order No. 5 rather than Order No. 6 and the BSEA considers the objection raised as to Order No.5.

an appropriate adaptation for the Student's disability and argues that such an accommodation would be appropriate and consistent with the provisions of Section 504 and the ADA.⁴

The School objects to Finding of Fact No. 29, Conclusion of Law No. 19 and Order No. 9 as being contrary to established procedures for providing speech and language therapy and unsupported by substantial evidence. Finding of Fact No. 29 relates the School's determination that the Student does not need PT/OT in connection with speech therapy. In Conclusion of Law No. 19 the IHO concluded that "respiratory function and breath control is important to the speech of a cerebral palsy student, and should be incorporated into therapies by the LEA." The School argues that any lack of breath control that the Student may have is directly attributable to her cerebral palsy and cannot be corrected through speech and language therapy but can be improved by good posture.

The School objects to Finding of Fact No. 20, Conclusion of Law No. 21 and Order No. 6 concerning the Student's need for extended school year as contrary to law and unsupported by substantial evidence. The School argues that the evidence did not show regression would be likely to occur or a long period of recoupment without the provision of extended school year services. The School also claims the IHO placed too much emphasis on range of motion measurements as a sole criterion in the determination of whether extended year services for OT and PT was appropriate.

The School raises a number of objections with respect to Findings of Fact Nos. 21, 22 and 23 and Conclusion of Law No. 14. The School objects to these findings and conclusion as a violation of its due process rights, claiming: (1) the IHO did not permit the School to confront or cross-examine the reports tendered by the parents; (2) the IHO ruled during the prehearing conference that Parent's Exhibit No. 12 would be permitted even though it was tendered on the first day of the hearing and objected to; (3) the IHO relied upon the written reports from Children's Hospital and the parents' private therapist to determine that the School's evaluation and the respective testimony concerning the Student's current educational needs were inconsistent with her prior therapy; and (4) the IHO participated in *ex parte* communication with the supervisor of the Parents' private PT concerning ROM measurements in the course of examining the evidence. The School claims surprise concerning evaluations tendered for the hearing as they relate to a change in the Student's medical condition and argue that the information was not disclosed five days prior to the hearing. The School requests the BSEA to order an independent educational PT and OT evaluation and to strike from the record all references to evidence that was not properly disclosed pursuant to the Five Day Rule and upon which the School had no opportunity to cross-examine and/or to subpoena the testimony of Ms. Scherer and Dr. Sarwark for cross-examination of range of motion measurements.

The School argues that Finding of Fact No. 22 is factually incorrect. This finding indicates that the "Student was taken by parent to the Indiana Medical Laboratories in Munster, Indiana, for evaluation (8 visits)" The School argues that the evidence indicates the

⁴Section 504 refers to Section 504 of the Rehabilitation Act of 1973, 29 USC §794. ADA refers to the Americans with Disabilities Act, 42 USC §§ 12101 *et seq.*

evaluation occurred on two days. The School also indicates that Finding of Fact No. 21 incorrectly states that the Student received an ankle serial cast from her ankle to below her knee while the cast also involved the foot as well.

The School objects to Findings of Fact Nos. 28, 29 and 32, Conclusions of Law Nos. 5, 16, 17, 18 and 19 concerning the credibility of the School's evaluation and testimony concerning the Student's need for PT and OT services as contrary to law, established procedure and substantial evidence.⁵ The School argues that Finding of Fact No. 23 is internally inconsistent in finding both "there is a discrepancy of the findings by the various practitioners, that differences are, in part, due to a normal variance in findings by different individuals and the methods of testing" and "the IHO further finds that testing by parents' various experts are more in harmony with each other than with the PT and OT of the LEA." The School again objects to there being no cross-examination concerning these evaluations and to the reliance upon ROM measurements. In Finding of Fact No. 28, the IHO found that both parties rely upon the "Guidelines" to support their positions relative to the appropriateness and extent of therapy services. The School takes exception to the omission of the application of OT/PT therapy for adapting the environment, which includes the use of wheelchairs, according to the "Guidelines." The School takes exception to that part of Finding of Fact No. 29 which states "The PT further stated increased PT would not result in progress." The School claims the School's PT actually indicated that increased levels of PT services would not result in greater progress than what has been demonstrated over the past year.

The School objects to Finding of Fact No. 32 as not being relevant. This finding concerns the parent's testimony about his 23 year old son with cerebral palsy who reportedly had greater involvement and has walked for the past 14 years. The School requests that this finding be struck.

The School objects to a portion of Finding of Fact No. 33 which relates the parent's comments and concerns about statements of LEA personnel, particularly those statements of LEA personnel "critiquing of evaluations performed by pregnant women and orthopedic doctors whom the individual has not conferred." The School objects to the Parents' refusal to permit the School to consult with their independent evaluators and efforts to preclude the School from an opportunity of direct cross-examination.

The School objects to Conclusion of Law No. 15, which "concludes that direct and consultative therapies of the LEA OT and PT have not been appropriate level of services" as being contradictory to Finding of Fact No. 26 and Conclusions of Law Nos. 4, 7, 8 and 18 and for overly relying upon ROM measurements.

⁵In the first Section G of its Petition for Review (two sections are labeled "G"), the School objects to these findings, conclusion and order. In its argument and footnotes, additional findings, conclusions and orders are discussed with objections. The BSEA will consider each of these objections even though not specifically raised other than in footnotes.

The School objects to that portion of Conclusion of Law No. 16 which indicated that the level of therapies recommended by New York are excessive when considering the Indiana PT/OT “Guidelines.” The School argues that the IHO ignored and did not apply the “Guidelines” for determining levels of services for the Student and instead followed the recommendations of Children’s Hospital.

The School objects to Conclusion of Law No. 17, which provides “ the recommendations of Children’s Hospital to increase physical therapy to three times per week to include aggressive stretching of gastrocnemius and knee areas are educationally appropriate and are proper within the Indiana Guidelines” as not being supported by the evidence. The School again claims it was precluded from cross-examination.

The School objects to Conclusion of Law No. 18 which provides:

The IHO concludes that Student has made considerable gains in mobility, transfers, and self-help skills in the past three years. The IHO further concludes that the opinions of parent, and parent experts that Student has the ability to improve walking skills, at minimal to a cane, to improve self-help skills to permit independent living, and to improve OT skills, such as penmanship, are persuasive, and are within educational parameters of the Indiana Guidelines, and justifies the greater need for therapy.

The School argues that this conclusion misstates the Parents’ experts’ opinion, which was that at best (not at a minimum) the Student would be able to walk with a cane. However, the School argues this amount of progress would not likely occur in the immediate or near future and this would not be considered “significant improvement” under the Guidelines.

The School objects to Order No. 7, claiming that the order requires the School to give an additional 30-40 minute per week of both PT and OT services on days when the Student is not receiving 90 minutes of both PT and OT. The School also objects to the part of this order requiring direct PT and OT services to begin prior to the normal school day so there would be minimal interruption to academics. The School claims that to require these services to be completed before the start of the school day would require the Student’s school day to begin at 6:30 a.m.

The School argues the above findings are unsupported by the evidence and that the IHO applied the wrong standard for determining the appropriateness of the IEP. The School claims the IHO ignored the evidence presented by the School concerning the Student’s progress and failed to distinguish medically related and educationally related therapies. Finally, the School claims the IHO wrongfully relied on the single procedure of range of motion measurements.

The School also objects to Finding of Fact No. 1 and Conclusions of Law Nos. 1 and 22 and asks the BSEA to strike all references to interim placement orders as an abuse of discretion and as being contrary to law. In Finding of Fact No. 1 and Conclusion of Law No. 1 the IHO relates that this matter is properly before the IHO pursuant to IC 4-21.5 et seq. and 511 IAC 7-15-5 and he has the authority to hear and rule upon all matters presented herein. In Conclusion of Law No. 22, the IHO noted the considerable discussion during the hearing concerning “stay-put” and further noted that the issues involved did not include a determination of pendent placement during hearing and/or appeal. The IHO also recited the stay-put language of Article 7

and referenced the similar language of IDEA, 20 USC 1415(e)(3) and the discussion in Susquenita School District v. Raelee, 24 IDELR 839 (3d Cir. 1996). The IHO then concluded “Although pendent placement is not an issue herein, and an Order thereon is beyond the scope of the IHO’s authority, the IHO recommends consideration of Susquenita for placement at Brummitt Elementary and the services ordered herein, if an appeal is undertaken.”

Parents’ Response to School’s Petition for Review

The Parents state that the IHO’s erroneous recitation of the Student’s 1991-92 educational experience was not significant. While the School alleges this error is significant and has led to erroneous conclusions, no reference is made to these conclusions. The Student’s 1991-92 therapies included speech therapy for 60 minutes, five days per week and combined PT and OT for 60 minutes, 5 days per week.

The Parents respond that Findings of Fact No. 4 and 10 regarding the Student’s placement at Parkview Elementary School were not materially erroneous. The September, 1996 IEP was designed for short duration to provide a diagnostic and teaching assessment. This IEP did provide for a total of 60 - 80 minutes per week of both OT and PT. Since the Orders were addressed to the adequacy of the IEP developed at the November 22, 1996 case conference, the relevancy of this finding relating to the September, 1996 diagnostic, short-term IEP is not apparent.

The Parents state that the determination by the IHO that §504 and ADA issues were not presented by the Parents’ request that the Student not be provided a wheelchair was not contrary to law, and that Finding of Fact No. 14 is accurate. The Parents note that the School hasn’t petitioned for review of Order No. 5.⁶ The Parents argue that securing permission from a parent for field trips is consistent with School policy. If a parent can withhold permission, certainly the parent has a right to grant permission with restrictions.

The Parents argue that the IHO did not err in requiring that the speech/language therapy to be provided include breath control and function components. The record supports the IHO’s determination that these are components of the Student’s speech difficulties and that these difficulties adversely affect her educational experience.

The Parents state that the IHO correctly determined the Student needed extended school year services in the form of OT and PT. The record contains substantial evidence of a deterioration in the Student’s condition under the disputed IEP. The existence of contractures and the need for instituting medical therapies, which had never before been recommended, justified the IHO in determining that the Student’s condition had deteriorated and that recoument was not easily attained.

⁶As indicated above, the School submitted corrections to its Petition for Review indicating that Order No. 6 was to be added to this issue. The School then quoted Order No. 5, which the BSEA understands to be the Order to which exception is taken.

The Parents contend that the IHO correctly admitted and considered certain evidence offered by the Parents. The Parents argue that hearsay evidence is admissible in administrative proceedings and further that the School waived any objection. The witness, Judy Rosevear, was listed on the Parents' witness list and could have been called by the School, which could have arranged for her testimony in person or by telephone. The School also objects now to the admission of Parents' Exhibits P-11 and P-12 which were admitted into evidence on the first day of the hearing without objection. As to the School's claim concerning the alleged ex parte communications by the IHO, the Parents note that the IHO's conversations with these individuals were conducted in the presence of all parties and the court reporter. If the School had any objection to proceeding in this fashion, it would have been a simple matter to place such an objection on the record. No such objection appears.⁷

The Parents state that the IHO's determination to accord greater weight to the results of testing done by the Parents' experts than those of the School's experts was within his discretion. Substantial evidence exists to support the IHO's determination, and for the BSEA to find otherwise would amount to a reweighing of the evidence. Under the Rowley⁸ standard, the School is required to provide a FAPE that is reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. The School's evaluators agreed the Student is not mentally handicapped but that her physical limitations have a similar impact upon her adaptive functioning. The School is clearly wrong when it indicates the record compels the conclusion that the Student is receiving sufficient educational benefit since the Student received failing grades. Substantial evidence exists to support the determination that in some respects the Student has regressed. Further, the IHO did not focus solely on range of motion studies.

Finally, the Parents point out that the IHO's "recommendation" concerning interim placement orders was not erroneous or contrary to law. The recommendation does not have the force of an order, therefore, there is nothing for the BSEA to review.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

The Indiana Board of Special Education Appeals met on August 28, 1997, to hear oral argument and conduct its review of the above-referenced matter. All members were present and had reviewed the record, the Petitions for Review and Responses. The Parents and Student were present and represented by legal counsel. A member of the local school board was present at the request of the Parents. Two representatives of the School were present as well as legal counsel for the School. Both parties presented oral argument and rebuttal. The Indiana Board of Special Education Appeals now finds as follows:

⁷The Parent also noted that the IHO's letter clarifying the record in response to this unwarranted attack on the integrity of the process adequately controverts those assertions.

⁸Rowley v. Board of Education, 458 U.S. 176 (1982).

Combined Findings of Fact and Conclusions of Law

1. The Indiana Board of Special Education Appeals (BSEA) has jurisdiction in the matter pursuant to 511 IAC 7-15-6.
2. The BSEA agrees with the School that the IHO made a factual error in Finding of Fact No. 4, but further finds that such error was inconsequential. The first paragraph of the Finding of Fact is revised to read as follows:
 4. The Student's initial enrollment with the LEA occurred in August 1996 at the Special Education Learning Facility (SELF School). The Student has been enrolled in the third grade at Parkview Elementary School since September 1996.
3. The BSEA agrees with the School that the IHO made a factual error in Finding of Fact No. 10, but further finds that such error was inconsequential. The Finding of Fact is revised to read as follows:
 10. As a result of the diagnostic period the LEA determined the Student was functionally at a higher level than the New York IEP suggested, and recommended a formal educational evaluation. The September case conference committee agreed to a change of placement to Parkview Elementary, third grade with direct OT diagnostic/teaching assessment activities 2 times per week, 30-40 minutes each, direct PT diagnostic/teaching assessment activities 2 times per week, 30-40 minutes each, 80 minutes of speech/language therapy per week, and supported and/or supplemental instruction for math in the general education setting by a resource teacher. Resp. Ex., p. 113.
4. The BSEA agrees with the School that the IHO made a factual error in Finding of Fact No. 22, but further finds that such error was inconsequential. The Finding of Fact is revised to read as follows:
 22. Following the Children's Hospital study, Student was taken by parent to the Indiana Medical Laboratories in Munster, Indiana, for evaluation and physical and occupational therapies. Indiana Medical reported, in part, pectoral musculature was very tight with very minimal scapular mobility. The PT therapies were 3-5 times per week until completion of the evaluation. Long term goals had not been established, or reported, at the time of hearing. Ex. P-12.
5. The BSEA finds no merit to the School's allegations that the IHO erred in Findings of Fact Nos. 1, 5, 14, 20, 21, 23, 26, 28, 29, 32 and 33. The record amply supports the IHO's findings that this matter is properly before the IHO and the IHO has the authority to hear and rule upon all matters presented; that the Student received a preschool instruction program during the 1991-92 school year which included OT, PT and speech therapy with each therapy service provided in 60 minute sessions five times per week and that therapy services at the same level were provided during the kindergarten year, 1992-93;⁹ that the Parents do not use a wheelchair

⁹The School has objected to Finding of Fact 5 indicating that it does not accurately reflect the amount of services the Student received during the 1991-92 school year. This Finding of Fact was based upon the School's exhibit, which it now claims was in error. The School cannot

with the Student and it was their determination that a wheelchair not be a consideration within the LEA environment, and that Sec. 504 and ADA issues were not before the IHO; that various PT progress reports were submitted which included ROMs, which indicated discrepancies due, in part, to a normal variance in findings by different individuals and the methods of testing, but the Parents' experts were more in harmony with each other than with the PT and OT therapists of the LEA; that the Student has shown improvements in physical functioning and transfers; that both parties relied upon the "Guidelines" during the course of the hearing; that the Parent testified as to his prior experience with cerebral palsy and his older son; and that the Parent expressed concern with various statements made by LEA personnel.

6. The BSEA finds that any objection the School may have had to Parents' Exhibit 12 is waived. No objection was made to the exhibit when it was offered at the start of the hearing. The School objects that it was not allowed to question or cross examine the experts who produced the exhibit. However, the School was not precluded or prevented from calling these potential witnesses nor did it call these individuals as witnesses. The School cannot now complain, after the fact, to the lack of testimony from these individuals. The School also objects to the alleged *ex parte* communication by the IHO with the supervisor of a potential witness. There is absolutely no evidence in the record to support an allegation that the IHO engaged in *ex parte* communications.¹⁰ No objections were raised at the time and any objections are therefore deemed waived. The record does not show that any *ex parte* communications occurred. The School has not been denied due process.

7. There is no evidence to indicate that "Indiana's Guidelines for the Provision of Occupational and Physical Therapy Services in Special Education" have ever been adopted by the Indiana State Board of Education, nor that these "Guidelines" have been published in the Indiana Register. Without such adoption and publication, they cannot be used as legal standards to enforce Article 7 nor to impose a sanction for a violation. I.C. 4-22-1-1.

8. The BSEA concludes that it is inappropriate to use the "Guidelines" as a legal standard for the provision of PT or OT services. Conclusions of Law 16, 17 and 18 are amended to delete references to the "Guidelines" as follows:

16. The IHO concludes that although the New York recommended therapies remained constant since preschool and the Student experienced significant gains in the past 3 to 4 years, that the level of therapies recommended by New York are excessive.

now object to alleged errors in fact which were invited by the School by the submission of allegedly erroneous exhibits.

¹⁰The School actually made two references to alleged *ex parte* communications. The School referenced one such alleged occurrence during the hearing and raised an objection to a telephone conversation concerning procedural matters on appeal. Both alleged occurrences occurred during the course of the hearing and in the presence of both parties. No objection was raised at the time to either alleged *ex parte* communication.

17. The IHO concludes that the recommendations of Children's Hospital to increase physical therapy to three times per week to include aggressive stretching of gastrocnemius and knee areas are educationally appropriate.

18. The IHO concludes that Student has made considerable gains in mobility, transfers, and self-help skills in the past three years. The IHO further concludes that the opinions of Parent, and parent experts that Student has the ability to improve walking skills, at minimal to a cane, to improve self-help skills to permit independent living, and to improve OT skills, such as penmanship, are persuasive and justifies the greater need for therapy.

9. The IHO's Conclusion of Law No. 5 is amended to correct the typographical error changing the word "now" to "no."

10. The IHO's Conclusions of Law Nos. 1, 4, 5, 7, 8, 14, 15, 19, 21 and 22 are based upon testimony presented and documentary evidence submitted, which the IHO had reduced to thirty-three (33) Findings of Fact. The BSEA upholds these Conclusions of Law¹¹ which found that the matter was properly before the IHO and he had the authority to rule upon matters presented; the requirements of a FAPE are satisfied if the LEA provides instruction with sufficient support services to permit the student to benefit educationally from that instruction; that caselaw indicates that parents do not have the right to compel the LEA to provide a specific program or to employ a specific methodology; that a FAPE is one which fulfills the minimum federal statutory requirements and an appropriate placement may be upheld even if the family prefers another alternative; that there has been a decrease in range(s) of motions during the school year and contractures are present which are not merely medical rather than educational needs; LEA OT and PT therapies have not been appropriate level of services; that respiratory function and breath control are important to the speech of a cerebral palsy student and should be incorporated into the therapies provided by the LEA; that the Student's age suggests she will experience moderate to significant growth over the next several years and that regression and contractures are a real possibility without continuous therapy over the summer; and that while pendent placement was not an issue before the IHO and Article 7 provides for "stay-put" unless the parties agree otherwise, the IHO recommended to the parties that they consider implementing the services in the order in the event of appeal.

All votes by the BSEA regarding the above were voice votes and were unanimous.

¹¹Although Conclusion of Law No. 5 has been amended by the BSEA to correct a typographical error, the conclusion is otherwise upheld in its entirety.

Orders of the Indiana Board of Special Education Appeals

In consideration of the above Combined Findings of Fact and Conclusions of Law, the Indiana Board of Special Education Appeals now holds:

1. The Findings of Fact of the IHO are upheld in all respects except as to the errors in Findings of Fact Nos. 4, 10 and 22, which are hereby corrected (see BSEA's FOFs Nos. 2, 3 and 4, *supra*).
2. The Conclusions of Law of the IHO are upheld in all respects except as to Conclusions of Law Nos. 16, 17 and 18 and the typographical error in Conclusion of Law No. 5, which are hereby corrected (see BSEA's FOF Nos. 8 and 9, *supra*).
3. The second paragraph of Order No. 7 is amended to read as follows:
 7. A daily exercise program shall be developed for the remaining two days per week. The treatment program is to be performed by an occupational therapist, physical therapist, occupational therapist assistant, or physical therapist assistant.
4. The Orders of the IHO are upheld in all respects except as to the second paragraph of Order No. 7 which is amended as indicated in BSEA Order No. 3.
5. The BSEA adds a new order as follows:
 11. The Student shall receive extended school day academic instruction to equal the instructional time spent in pull-out occupational, physical and speech/language therapies.
6. The School was not denied due process.
7. All other Motions or objections not specifically addressed herein are hereby deemed denied.

Date: September 2, 1997

/s/ Cynthia Dewes
Cynthia Dewes, Chair
Board of Special Education Appeals

Appeal Right

Any party aggrieved by the written decision of the Indiana Board of Special Education Appeals has thirty (30) calendar days from receipt of this decision to request judicial appeal from a civil court with jurisdiction, as provided by I.C. 4-21.5-5-5 and 511 IAC 7-15-6(p).